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Business Information and "Personal Data": Some Common-Law Observations About the EU Draft Data Protection Directive*

*James R. Maxeiner***

This Comment originated from an interview in early 1992 with Professor Joel Reidenberg, one of the two featured speakers of the second session of this symposium regarding U.S. privacy practices, on his study of American Data Protection Law for the European Union (EU). We discussed an earlier draft of legislation that would later become the Common Position adopted by the EU Council with a view to adopting Directive 95/ /EC of the European Parliament and Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data¹ (Draft Directive), which provides for regulation of private in addition to governmental processing of "personal data."

Article 2(a) of the Directive defines personal data as "any information relating to an identified or identifiable natural person ('data subject')." This broad definition seems to encompass as personal data even an incidental notation about the chief executive officer of a corporation in a privately commissioned business information report regarding that corporation. For example, it appears to reach a report on Microsoft Corporation that includes the statement that "William H. Gates, III, born 1955, was cofounder of the business in 1975, has been active there since, and is Chairman of the board and CEO."

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1. This article was written as a response to the Commission of the European Communities' "Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data" of October 15, 1992, 1992 O.J. (C311/30) 35 [hereinafter 1992 Commission Draft]. Only after this article was completed and edited did the Council publish its Common Position, 1995 O.J. (C 93) 1 [hereinafter Draft Directive], the text of which is reprinted in Appendix A of this issue of the Iowa Law Review. While references to the 1992 Commission Draft have been updated to the Council's Draft Directive and are all current, it has not been possible to fully revise this article to take complete account of the changes made by the Council. Some of the issues discussed here under the 1995 Council Draft Directive are discussed in James R. Maxeiner, *Freedom of Information and the EU Council Draft Directive*, 47 Fed. Comm. L.J. ____ (forthcoming, Fall 1995).

The title of this symposium is Information Privacy and the Public Interest. The public interest is not served by privacy safeguards alone. The public interest also calls for an open and free flow of information. In business transactions generally, in both common-law and civil-law jurisdictions, affirmative duties to disclose pertinent information frequently exist.² American securities laws, for example, impose obligations to disclose.

More broadly, businesses present themselves to the public to do business with the public. The public, when it deals with a business, justifiably wants to know basic facts about the people behind the business. Typically the public wants to know such facts as: (1) the owners of the business; (2) the business-related background and experience of the owners; and (3) the business-related background and experience of the principal managers.

Thus, information about business persons may be as much business data as personal data. These data are reported incidental to data on the business. They are used in connection with business decisions. They frequently are drawn from public record sources. The business, rather than the individual, bears the brunt of adverse consequences derived from these data. In view of the business focus, rather than the personal focus of these data, as well as the strong interest of the public in having access to these data, rules designed to protect persons who are only consumers may have to be tempered when applied to persons involved in business. There are few people who would argue that persons who present their businesses to the public should be permitted to remain anonymous or be allowed to control public comment on their business activities.

Business information providers want to know what accommodation the EU will make for the public interest in a free flow of information about data subjects involved in business. They want to know to what extent the EU will protect the freedom of all members of society to collect and disseminate information.

This Comment uses a common-law, comparative perspective to examine the Draft Directive's treatment of business information involving individual data subjects. Its goal is limited to issue-raising; it does not attempt a comprehensive review of these issues. Part I of this Comment examines the common-law treatment of data protection.³ Part II analyzes the definition of "personal data" in the EU Draft Directive.⁴ Part III discusses the regulatory aspect of the Draft Directive and the Draft Directive's protection of freedom to collect and disseminate information.⁵

2. See generally Nicola W. Palmieri, Good Faith Disclosures Required During Precontractual Negotiations, 24 Seton Hall L. Rev. 70 (1993) (discussing disclosure requirements for business transactions under U.S., Italian, and German law).

3. See *infra* notes 6-44 and accompanying text.

4. See *infra* notes 45-68 and accompanying text.

5. See *infra* notes 69-103 and accompanying text.

I. COMMON-LAW PERSPECTIVE

The two featured speakers of the U.S. portion of the Symposium, Professors Joel Reidenberg and Paul Schwartz, have criticized American data protection law. Professor Reidenberg has pointed out that "the American legal system responds incoherently and incompletely to the privacy issues raised by existing information processing activities in the business community."⁶ He has observed that no generally applicable data protection law exists in the United States. Professor Reidenberg has concluded that "[b]ecause privacy rights in the United States for commercial information processing depend on legislation targeted at narrow problems and rather limited common law rights, the lack of a coherent and systematic approach to existing privacy concerns presents an undesirable policy void."⁷ Professor Schwartz has written of "The Failure of the American Legal Response to the Computer."⁸ Professor Schwartz has complained that in the United States "[t]here is still no constitutional right adequate to protect the individual in the information age."⁹ Both Professors Reidenberg and Schwartz have advocated that the United States learn from European experiences.¹⁰ Professor Schwartz has lauded the German Constitutional Court for avoiding reliance on notions of privacy and confidentiality and accepting "the social nature of information and calling for measures to structure the handling of personal data."¹¹

Professors Reidenberg and Schwartz are correct: Common law privacy rights do not provide systematic protection. But common-law experiences still offer something. If a benefit of civil-law methods is a coherent approach to problems coupled with systematic legislation to implement solutions,¹² a virtue of common-law methods is a case-by-case working out

6. Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 Fed. Comm. L.J. 195, 199 (1992). Probably the most important of these sectoral laws is the Fair Credit Reporting Act, 15 U.S.C. §§ 1681a to 1681t (1988), which, however, applies generally only to "consumer reporting agenc[ies]." Id. § 1681a(f).

7. Reidenberg, *supra* note 6, at 236.

8. Paul M. Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 Hastings L.J. 1321 (1992).

9. Paul M. Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination*, 37 Am. J. Comp. L. 675, 694 (1989). In writing this Comment, I did not have the benefit of either Professor Reidenberg's or Professor Schwartz's remarks at the Symposium.

10. *See, e.g.*, Reidenberg, *supra* note 6, at 237 ("Other ways of addressing these concerns in different countries may offer illustrative guidance for United States policy."); Schwartz, *supra* note 9, at 686 ("The American Supreme Court's deficient idea of constitutional data protection law can be contrasted with the more successful principles articulated by the German Constitutional Court."); *see also* Joel R. Reidenberg, *The Privacy Obstacle Course: Hurdling Barriers to Transnational Financial Services*, 60 Fordham L. Rev. S137, S141-60 (1992).

11. Schwartz, *supra* note 9, at 690.

12. *See* James R. Maxeiner, *Policy and Methods in German and American Antitrust Law: A Comparative Study* 27-31 (1986) [hereinafter Maxeiner, *Policy and Methods*] (presenting a general discussion of common law methods); James R. Maxeiner, 1992: High Time for

of clashes of competing interests. As discussed below,¹³ the EU Draft Directive has developed from a systematic approach to legislation concerned primarily with regulation of governmental data collection activities. It has given less comprehensive treatment to interests of the public in a free flow of information. Experiences of other jurisdictions that have paid closer attention to these interests may be useful.

Common-law privacy rights developed with acute awareness of the interest in freedom of information collection and dissemination. In *Roberson v. Rochester Folding Box Co.*,¹⁴ one of the first American privacy cases, and one more hostile to privacy rights than most, the New York Court of Appeals rejected the claim that unauthorized use of a person's likeness on a flour package supported a claim for damages.¹⁵ The Court considered the claim too great a restriction on third party comment on neighbors' activities:

The so-called "right of privacy" is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise.¹⁶

The court's hostility toward a common-law right of privacy led the New York State Legislature to adopt a statutory right of privacy. That right remains in effect to this day, although it is a limited rather than a general right of privacy.¹⁷

Common-law privacy rights are not intended to be a response to privacy issues raised by commercial information processing activities generally. They hardly could be. They mandate no affirmative obligations, such as obligations of notification, data quality, information subject access, or security. At most, common-law privacy rights impose limited constraints on distribution of information. Because common-law methods address privacy issues on a case-by-case basis, they are not suited to developing a general regimen of data protection. The *Roberson* court held the view that there is an "absolute impossibility of dealing with this subject save by legislative enactment, by which may be drawn arbitrary distinctions which no court should promulgate as part of general jurisprudence."¹⁸

American Lawyers to Learn from Europe, or Roscoe Pound's 1906 Address Revisited, 15 *Fordham Int'l L.J.* 1, 12 (1991) [hereinafter Maxeiner, Roscoe Pound's Address] (quoting Pound for the proposition that "we have no true system of the common law, much less a system of the law that actually governs").

13. See *infra* text accompanying notes 61-103.

14. 64 N.E. 442 (N.Y. 1902).

15. *Id.* at 442.

16. *Id.* at 443.

17. N.Y. Civ. Rights Law §§ 50-52 (Consol. 1976).

18. *Roberson*, 64 N.E. at 447. One is overly optimistic to expect a systematic law from the

Courts and commentators typically separate common-law privacy rights into four types: (1) intrusion; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation.¹⁹ Collectively, these rights constitute the "right of each individual to be let alone."²⁰

"Intrusion" requires an intentional infringement "upon the solitude or seclusion of another or his private affairs."²¹ A third party does not violate this right if the personal information is openly visible to the public or is voluntarily disclosed.²²

"Public disclosure of private facts" requires a release of personal information that "would be highly offensive to a reasonable person, and is not of legitimate concern to the public."²³ A third party does not violate this right if the party obtains the personal information from public sources.²⁴ The U.S. Supreme Court has relied on the First Amendment to impose stringent constitutional restrictions on state statutes prohibiting public disclosure of personal information obtained from public sources.²⁵

"False light in the public eye" protects against widespread disclosure of misleading or erroneous information.²⁶ This cause of action often

judiciary, either here or in Germany. As Professor Schwartz noted, "[T]he legislature is to pass laws that set provisions for every constellation of data use and transmission." Schwartz, *supra* note 9, at 691.

19. William Prosser presented this division in Privacy, 48 Cal. L. Rev. 383, 389 (1960). Prosser went on to adopt these categories in his later works. See William L. Prosser, *Handbook of the Law of Torts* § 117 (4th ed. 1971) [hereinafter Prosser, *Handbook*]; *Restatement (Second) of Torts* § 652 (1977). See also Reidenberg, *supra* note 6, at 221 (making same division).

20. Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independently of Contract* § 101 at 195 (John Lewis ed., student ed. 1907). See also Prosser, *Handbook*, *supra* note 19, § 117 at 802 (noting that the right to privacy was coined as the "right to be let alone" as early as 1890).

21. *Restatement (Second) of Torts* § 652B (1977).

22. See Reidenberg, *supra* note 6, at 222-23 (citations omitted).

23. *Restatement (Second) of Torts* § 652D (1977).

24. *Duran v. The Detroit News, Inc.*, 504 N.W.2d 715, 720 (Mich. 1993) ("A cause of action for public disclosure of private facts requires the disclosure of information that would be highly offensive to a reasonable person and of no legitimate concern to the public, and the information disclosed must be of a private nature that excludes matters already of public record or otherwise open to the public eye."); Reidenberg, *supra* note 6, at 223-24; cf. *Doe v. New York City*, 21 Media L. Rptr. 1734, 1736 (S.D.N.Y. 1993) ("The constitutional right to privacy does not extend to matters of public record.").

25. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding unconstitutional a Florida statute banning publication of a rape victim's name). The Court stated:

Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.

Id. at 541.

26. *Restatement (Second) of Torts* § 652E (1977).

overlaps an action for defamation.²⁷ Third parties can avoid violating this right by disseminating only truthful and nonmisleading information or by limiting dissemination to a small group.

"Appropriation" refers to the unauthorized use of one's name or likeness for advertising purposes and has come to be called a "right of publicity."²⁸ It involves the use of a person's name, likeness, or other indicia of identity, by a third person for purposes of trade, without consent.²⁹ The right protects against the use of the information by a third party for advertising and marketing purposes. It ordinarily does not extend to "the use of a person's identity in news reporting, commentary, entertainment, or in works of fiction or nonfiction."³⁰

Common-law privacy rights are thus held within narrow limits. They do not take something which is public and make it private. With the one exception of appropriation, they do not turn privacy rights into property rights. For a privacy right to apply, there must be a clear encroachment on the personal sphere of the data subject. Privacy limitations have made unnecessary the development of a First Amendment jurisprudence protecting public comment from privacy claims.³¹

Two recent books examine the common law of privacy and seek to bring new form to parts of it: Raymond Wacks's *Personal Information: Privacy and the Law*³² and Thomas McCarthy's *Rights of Publicity and Privacy*.³³ Wacks seeks to identify the core of privacy law. He would exclude actions for intrusion³⁴ and appropriation³⁵ from a discussion of

27. Prosser, *Handbook*, supra note 19, § 117, at 813.

28. J. Thomas McCarthy, *The Rights of Publicity and Privacy* 1-37 (1987 & Supp. 1994); Restatement (Third) Unfair Competition § 46 (1995). This change involves more than designation. A right of publicity is considered a property right which is subject to ownership and assignment, whereas a right of privacy is considered a personal right that is not subject to ownership or assignment. See infra notes 40-42 and accompanying text. Two comparative law treatments of the right of publicity and the corresponding right in Germany have just been published. See Horst-Peter Götting, *Persönlichkeitsrechte als Vermögensrechte* (Tübingen: Mohr, 1994) and Hanns Arno Magold, *Personenmerchandising: der Schutz der Persona im Recht der USA und Deutschlands* (Frankfurt: Lang, 1994).

29. Restatement (Third) Unfair Competition § 46 (1995); Restatement (Second) of Torts § 652C (1977).

30. Restatement (Third) Unfair Competition § 47 (1995).

31. The United States Supreme Court considered the relationship between the right of publicity to First Amendment protections of free speech in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In *Zacchini*, a local television station broadcast as news, without permission, the entire 15 second act of Zacchini's county fair show as the "human cannonball." In a 5-4 decision, the Court held that the First Amendment protection of free speech did not override state publicity law to permit the television station to broadcast the entire performance as news. *Id.* at 577-79.

32. Raymond Wacks, *Personal Information: Privacy and the Law* (1989).

33. McCarthy, supra note 28.

34. See Wacks, supra note 32, at 247-48.

The problems of 'personal information' thus tend to arise when it is sought to use such information; how it was obtained may then of course be a relevant consideration. But it should be stressed that there is no necessary connection between

privacy rights. "The essence of my argument," Wacks wrote, "is that at the heart of the concern about 'privacy' is the use, and especially the misuse, of 'personal information' about an individual."³⁶

Wacks's definition of personal information differs significantly from the EU Draft Directive's definition of personal data. Wacks would use the following definition: "'Personal information' consists of those facts, communications, or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict their collection, use or circulation."³⁷

Wacks's conclusion is that "there is no compelling case for applying the concept of property to 'personal information' as defined in this book."³⁸ For Wacks, definitions of personal information should include two distinct elements: the quality of the information and the individual's reasonable expectations concerning its use.³⁹ With respect to quality of information, Wacks has a three-category classification scheme: low sensitivity (e.g., name), medium sensitivity (e.g., spouse's name), and high sensitivity (e.g., status as substance abuser).⁴⁰

Thomas McCarthy, a well-known intellectual property lawyer, seeks in his work to distinguish rights of privacy from a right of publicity. He draws the right of publicity from the action for appropriation, determines that "[t]he Right of Publicity is a 'property right,'" and concludes that "it is an intellectual property right along with patents, trademarks, copyrights and trade secrets."⁴¹ This is an important result of his argument, for personal information would not normally qualify as a patent (it lacks the necessary novelty), as a trademark (it lacks the necessary use in commerce), as a copyright (it lacks the necessary originality of expression), or as a trade secret (it lacks the necessary commercial application). In contrast, rights of privacy, according to McCarthy, are personal and therefore are not transferable and do not constitute property.⁴² The Restatement (Third) Unfair Competition largely adopts McCarthy's views.⁴³ When McCarthy argues that the Right of Publicity is an intellectual property right, he does not argue that the interest of the subject in the information itself is the

the acquisition of 'personal information' and the individual's interest i[n] not being observed.

Id.

35. Id. at 47 & n.75.

36. Id. at 1-2.

37. Id. at 26.

38. Id. at 49.

39. Wacks, *supra* note 32, at 24.

40. Id. at 229.

41. McCarthy, *supra* note 28, at 1-7; *see also* id. § 10.2.

42. Id. § 10.1.

43. *See* *supra* notes 28-30 and accompanying text (stating that the right to publicity protects against the use of information by a third party for advertising and marketing purposes).

substance of that right. The data subject does not "own" the data. Rather, the data subject owns the right to control certain commercial exploitation of that information, such as its advertising use.⁴⁴

Questions from the Common Law

In the United States, it is clear that collecting and disseminating business information that includes data about individuals does not automatically trigger rights in the individual. In principle, everyone is free to collect information from public and private nonconfidential sources and to use it to comment on the business activities of one's neighbors. Thus no consequences flow from reporting that Bill Gates is President of Microsoft and has been since he founded the company in 1975. There is no sensitive personal information in Wacks's sense and no commercial exploitation in McCarthy's sense.

This brief review of common-law privacy rights suggests the following questions about the EU Draft Directive concerning its definition of personal data and its accommodation of personal data collection and dissemination in business contexts:

- What sort of interests does the Draft Directive protect? Privacy (i.e., sensitivity)? Publicity (i.e., exploitation)? Other interests? Are personal data property?
- How are personal data rights limited to reflect accommodation for third parties?

II. "PERSONAL INFORMATION" IN THE EU DRAFT DIRECTIVE

Article 2 of the Draft Directive defines "personal data" as "any information relating to an identified or identifiable natural person ('data subject')." The explanatory memorandum to the 1992 Commission Draft noted that the "amended proposal meets Parliament's wish that the definition of 'personal data' should be as general as possible, so as to include all information concerning an identifiable individual."⁴⁵

A. Public Law Orientation

Why did the EU adopt such a far-reaching definition? This definition was not new to the EU Draft Directive, but is found already in substantially similar form in the Council of Europe Convention⁴⁶ and in the OECD

44. The right of publicity is "the inherent right of every human being to control the commercial use of his or her identity." McCarthy, *supra* note 28, at 1-37 (emphasis added). *But see* Anne Wells Branscombs, *Who Owns Information? From Privacy to Public Access Passim* (1994) (examining interests in a variety of types of information); Reidenberg, *supra* note 6, at 226-27 (suggesting that there may be authority for regarding mere circulation of a mailing list containing a party's name as within that right).

45. 1992 Commission Draft, *supra* note 1, at 9 (explanatory memorandum).

46. Convention for the Protection of Individuals with Regard to Automatic Data Processing of Personal Data, ch. 1, art. 2, § a, Eur. T.S. No. 108 (Jan. 28, 1981), *reprinted in* 20

Guidelines.⁴⁷ The Draft Directive and its predecessors likely adopted such a broad definition because of their public-law rather than private-law orientation. Public law regulates relations between the state and its members; there is a relationship of subordination. States typically enforce public laws through administrative action. Private law, on the other hand, governs relations among individuals based on equality and self-determination, in short, private autonomy. Private parties typically enforce private laws through civil lawsuits.⁴⁸ Professor Reidenberg has pointed out that "European countries view data protection regulation as the realm of 'public law' and define substantive rights and obligations in a way that reflects a statist vision of governance. . . . The American approach, in contrast, is founded on principles of private rights and libertarian governance."⁴⁹

The Hessian data protection law, generally considered to be the world's first, concerned only governmental control of data, and to this day extends no further.⁵⁰ When the German Constitutional Court recognized a quasi-constitutional right to "information self-determination in 1983,"⁵¹

ILL.M. 317 [hereinafter European Convention] ("Personal data" means any information relating to an identified or identifiable individual ('data subject').").

47. Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, Annex to the Recommendation of the Council of 23rd September 1980 OECD, pt. 1, cl. (1)(b) (1980) [hereinafter Guidelines] ("Personal data" means any information relating to an identified or identifiable individual (data subject).").

48. The distinction between public and private law has probably had greater importance in civil-law jurisdictions than in common-law ones. Max Weber called it "[o]ne of the most important distinctions in modern legal theory and practice." 2 Max Weber, *Economy and Society* 641 (Guenther Roth & Claus Wittich eds., 1968); Max Weber on Law in Economy and Society 41 (Max Rheinstein ed., Harvard Univ. Press 1954). See generally Heinrich Lange & Helmut Köhler, BGB Allgemeiner Teil 2-3 (16th ed. 1977); Karl Larenz, Allgemeiner Teil des deutschen Bürgerlichen Rechts 1 (4th ed. 1977); 1 Hans J. Wolff & Otto Bachof, *Verwaltungsrecht, Ein Studienbuch* § 22 (1974). For a discussion of this distinction from a common-law perspective, see generally David J. Danielski et al., Public Law, in 13 *International Encyclopedia of the Social Sciences* 175-88 (David L. Sills ed., 1968); L. Harold Levinson, The Public Law/Private Law Distinction in the Courts, 57 *Geo. Wash. L. Rev.* 1579 (1989). The distinction is not made consistently everywhere. Indeed, single jurisdictions do not make it uniformly. Observers question its continued validity and even regard it as dangerous. See Bernd Schilcher, Gesetzgebungstheorie und Privatrecht, in Günther Winkler & Bernd Schilcher, *Gesetzgebung: Kritische Überlegungen zur Gesetzgebungslehre und zur Gesetzgebungstechnik* 35, 49 (1981). It remains, nonetheless, a useful distinction.

49. Joel R. Reidenberg, Rules of the Road for Global Electronic Highways: Merging the Trade and Technical Paradigms, 6 *Harv. J.L. & Tech.* 287, 302 (1993).

50. See *Hessisches Datenschutzgesetz in der Fassung des Gesetz zur Änderung des Hessischen Datenschutzgesetzes vom 21. Dec. 1988*, Gesetz- und Verordnungsblatt für das Land Hessen, I, 309 (1988) as amended Dec. 11, 1988, art. 1 ("The purpose of this Act is to regulate the processing of personal data by public bodies.") (translation in *Data Protection in the European Union: The Statutory Provisions* (Spiros Simitis et al. eds., 1994)).

51. Judgment of Dec. 15, 1983, *Entscheidungen des Bundesverfassungsgerichts*, 65 BVerfGE 1; Heribert Prantl, Der Datenschutz zehn Jahre nach dem Volkszählungsurteil: Unanständiges für unanständige Leute. Der späte Sieg des ehemaligen Innenministers Friedrich Zimmermann, *Süddeutsche Zeitung*, Dec. 16, 1993, available in LEXIS, World Library, SDZ

its focus was not on issues of private collection of data.⁵²

What began as an attempt to limit the State, soon turned to concerns that "Big Brother" might have "very gifted little sisters."⁵³ In Germany today, while the federal constitution has yet to include an explicit right of privacy, some state constitutions already do.⁵⁴ For example, the recently adopted constitution of Thuringia in former East Germany includes a detailed right of privacy which provides:

Everyone has the right to consideration and protection of his personality and of his private life. Everyone is entitled to protection of his personal data. He is entitled to determine the disclosure and use of such data for himself. These rights may be limited only by a statute. [W]ithin the terms of statutory law, everyone has a right to be told what information concerning him is contained in files and databases and to view those files and databases that concern him.⁵⁵

The Data Protection Commissioner for the German state of Baden-Württemberg recently stated that "Data protection . . . is the right of every individual to decide fundamentally for himself, who may know what about him and when."⁵⁶ At least in Germany there would appear to be a move toward letting individuals pass through the world controlling what is said about them, the very anathema feared by the New York Court of Appeals in *Roberson*.⁵⁷

The Draft Directive leaves no doubt that it wishes to eradicate differences in treatment between data collected and processed by governmental entities and data collected and processed by private entities. The explanatory memorandum that accompanied the 1992 Commission Draft noted that, at the request of the European Parliament, "[t]he amended proposal . . . drops the formal distinction between the rules applying in the public sector and the rules applying in the private sector."⁵⁸ This produces the "advantage," the commentary noted, "of making it clear that the protection provided is the same in both the public and the private sectors."⁵⁹ One should hardly expect that the transfer of public law concepts and rules to private law relations should occur without difficulty.⁶⁰

File.

52. See Friedhelm Hufen, *Das Volkszählungsurteil des Bundesverfassungsgerichts und das Grundrecht auf informationelle Selbstbestimmung-eine juristische Antwort auf '1984'?*, 1984 *Juristenzeitung* (JZ) 1072, 1076. Professor Schwartz regards the decision as having anticipated extension to private relations, even if it did not have direct applicability. See Schwartz, *supra* note 9, at 690-91.

53. Hufen, *supra* note 52, at 1076 ("sehr begabte jüngere Schwestern").

54. See Hans-Hermann Schrader, *Datenschutz in den Grundrechtskatalog*, 1994 *Computer und Recht* (CR) 427.

55. *Id.* at 428 (quoting Article 6).

56. Prantl, *supra* note 51.

57. *Roberson v. Rochester Folding Box Co.*, 644 N.E. 442, 442-43 (N.Y. 1902).

58. Draft Directive, *supra* note 1, at 2 (official commentary).

59. *Id.*; see also *id.* at 16 (providing comment on Article 7).

60. Cf. Thomas Christian Paefgen, *Adreßhandel und Medienprivileg*, *Computer und*

B. *Objects of the Draft Directive*

The Draft Directive identifies two principal objects: protection of the right of privacy and prevention of obstacles to the free flow of information within the EU. These are apparent in the Draft Directive's title, "On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data." Article 1(1) states the Draft Directive's first object: to "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data."⁶¹ Article 1(2) provides the second object: "Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1."⁶²

Clearly, privacy is a principal object, and probably *the* principal object of the Draft Directive. In this regard, the Draft Directive follows the Convention of the Council of Europe⁶³ and the OECD Guidelines.⁶⁴ The Draft Directive limits the scope of the privacy interest to privacy of natural persons and does not extend the interest to legal entities.⁶⁵ Nonetheless, the Draft Directive clearly does not limit the scope of privacy to Wacks's sense of "intimate or sensitive" or to the general contours of the common law.⁶⁶

Beyond those two goals, it is not apparent that the Draft Directive seeks to achieve other objectives. While data protection commentators are careful to point out that data protection is just one aspect of privacy protection,⁶⁷ the Draft Directive does not specify other objects it may seek to achieve.

The Draft Directive does not go so far as to establish a general right of property in personal data. Indeed, little in the Draft Directive suggests development of even a limited right similar to the common-law right of publicity. By and large the Draft Directive is concerned more with *processing* of personal data and less with *use* of such data, although the Draft

Recht, Jan., 1994, at 14 (discussing the German data protection law).

61. Draft Directive, *supra* note 1, art. 1(1).

62. Draft Directive, *supra* note 1, art. 1(2).

63. "The purpose of this convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ('data protection')." European Convention, *supra* note 46, at 29.

64. "These Guidelines apply to personal data, whether in the public or private sectors, which, because of the manner in which they are processed, or because of their nature or the context in which they are used, pose a danger to privacy and individual liberties." Guidelines *supra* note 47, at para. 2.

65. Draft Directive, *supra* note 1, at art. 1(1). Cf. Judgment of Feb. 8, 1994, 1994 Computer und Recht (CR) 396-98 (discussing the personality right of an enterprise under the German Civil Code).

66. See *supra* text accompanying notes 16-38.

67. See, e.g., David H. Flaherty, *Protecting Privacy in Surveillance Societies* xiii-xiv (1989).

Directive defines processing to include use such as dissemination. It gives data subjects certain rights of notification about processing, certain rights in how that processing is conducted, but few rights in how personal data is used. The most notable exception is Article 14(b) which indirectly gives data subjects the right to prevent personal data from being used for "the purposes of direct marketing."⁶⁸

III. FREEDOM OF DATA COLLECTION AND DISSEMINATION

The Draft Directive is not directly applicable law. Instead, it constitutes a direction to Member States to enact law.⁶⁹ Thus, the Draft Directive can accommodate competing interests directly by mandating certain rules and indirectly by permitting Member States, in their own legislation, to make such accommodation. Article 5 recognizes this explicitly stating, "Member States shall, within the limits of the provisions of this Chapter, determine more precisely may more precisely the conditions under which the processing of personal data is lawful."⁷⁰

A. Regulation Regime

The Draft Directive mandates comprehensive control of processing of personal data by government and private parties alike. Article 6 imposes requirements of data quality, including accuracy and limitations on purpose and time of retention. Article 7 restricts the permissible grounds for processing data. Article 8 prohibits the processing of sensitive data, such as that relating to racial or ethnic origin. Articles 10 and 11 require notification be given to the data subject. Articles 12 and 13 grant data subjects rights regarding access to the data. Articles 14 and 15 grant data subjects rights to object to processing of data. Additional issues addressed by the Draft Directive include requirements of levels of security (Article 17); obligation to notify the supervisory authority of processing (Articles 18-21); judicial remedies, liability, and penalties (Articles 23 and 25); and limitations on transborder transmission of personal data (Article 25).

Focus on Regulation

The Draft Directive focuses principally on the individual's interest in privacy and on the accompanying regulatory regime designed to secure that interest. When the Draft Directive addresses issues of privacy and regulation, typically it does so in precise terms in rules that it mandates Member States to adopt. When, on the other hand, it addresses issues of freedom, typically it does so in less precise and even indefinite terms in

68. Draft Directive, *supra* note 1, art. 14(b).

69. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 9, *Treaties Establishing the European Communities*, 171-505. ("A directive shall be binding in its entirety, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.")

70. Draft Directive, *supra* note 1, art. 5.

authorizations that may permit; but do not always require, Member States to make accommodations for that freedom. Insofar as these accommodations become significant, this lack of clear direction may lead to an undesirable lack of harmony in the laws of Member States.

If the Draft Directive only imposed specific prohibitions, its failure to address freedom of information collection and distribution more fully might not be especially troubling. However, the Draft Directive is not so limited. Its technique is to mandate prohibition of all processing of personal data that it does not specifically allow. While the American rule permits everything that is not prohibited, the EU rule prohibits everything that is not permitted.⁷¹ Consequently, the Draft Directive's failure to adequately address freedom issues almost necessarily affects those freedoms negatively.

Although the EU is unlikely to reverse itself on the application of a general rule prohibiting information collection and dissemination, one may still question its wisdom. A general rule of prohibition coupled with limited authorizations makes more sense when there is some reason to discourage the underlying activity generally. That might be the case, for example, where the underlying activity is usually regarded as undesirable, such as restraints of trade, or where the actor affected is to be restricted, such as a government of limited powers.⁷² That goal does not, however, seem to be present in nongovernmental collection and dissemination of information. A free society depends on a free flow of information. Article 10 of the European Convention on Human Rights explicitly guarantees the right to receive and distribute the information. The EU Draft Directive, in adopting a general rule of prohibition, seems to challenge those tenets, at least as applied to personal data.

B. Scope of Application

Article 3. Scope. Article 3 provides two relevant explicit limitations on the scope of the Draft Directive. One prevents application of the Draft Directive to manual, noncomputer data processing,⁷³ and the other prevents application to processing by natural persons.⁷⁴ These two limitations do not seem likely, however, to provide important accommoda-

71. This is obvious ammunition for the many series of jokes based on national characters, e.g., in England, everything is permitted unless prohibited, in Germany everything is prohibited unless permitted, and in France everything is prohibited, but nobody pays any attention. The technique is not, however, foreign to Member State law. See *infra* note 79 and accompanying text.

72. For example, German antitrust law adopted a general rule of prohibition with extensive opportunities for exemptions and permissions rather than a general abuse control. David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 *Am. J. Comp. L.* 25, 64-66 (1994). See also Rudolf Isay, *Die Geschichte der Kartellgesetzgebungen* 74-78, 88-90 (1955); Maxeiner, *Policy and Methods*, *supra* note 12, at 18.

73. See Draft Directive, *supra* note 1, art. 3(1).

74. See *id.* art. 3(2).

tions for freedom of information collection and distribution.

Paragraph 1 of Article 3 provides that the Draft Directive shall apply to processing "wholly or partly by automatic means, and . . . otherwise than by automatic means of personal data which form part of a file or is intended to form part of a file."⁷⁵ This provides a safe haven for personal data collected incidentally to some other information-collecting activity, so long as the principal data collecting is not computerized. In terms of the Microsoft example, a newspaper clipping file that is not entered into a computer system and that contains personal data about Mr. Gates would not be subject to the Draft Directive. The practical effect of this provision may be less significant than anticipated as data collectors shift more information to electronic files through scanning, imaging, and data entry.

Paragraph 2 of Article 3 provides that the Draft Directive shall not apply "to the processing of personal data by a natural person in the course of a purely personal or household activity."⁷⁶ According to a statement for entry in the minutes accompanying the Draft Directive: "[T]he Council and Commission consider the expression 'purely personal or household activity' must not make it possible to exclude from the scope of the directive the processing of personal data by a natural person, where such data are disclosed not to one or more persons but to an indeterminate number of persons."⁷⁷ Since the exemption does not apply to corporate entities, it can have little effect in protecting the free flow of business information.

Article 7. Ground for processing required. Article 7 establishes the basic rule of prohibition: "Member States shall provide that personal data may be processed *only if*" one of six conditions is met.⁷⁸ Member States are to prohibit "processing," defined by Article 2(b) to include essentially any operation concerned with personal data, unless the processing satisfies one of the particular justifications enumerated in Article 7 or is otherwise exempted by the Draft Directive. Because Article 2(b) defines "processing" broadly, Article 7 is widely applicable. Article 14 provides, in a separate mandatory rule, that with respect to cases referred to in Article 7(e) and 7(f), "Member States shall grant the data subject the right . . . to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him," and that when there is a "justified objection," the controller shall cease the processing.⁷⁹

Most private party processing of personal data would be permissible only if Article 7(a), 7(b), or 7(f) is satisfied.⁸⁰ Article 7(a) permits

75. Id. art. 3(1).

76. Id. art. 3(2).

77. Statements for Entry in the Minutes Accompanying the Draft Directive, 4730/95 Annex 1 at 3 [hereinafter *Statements for Entry*].

78. Draft Directive, *supra* note 1, art. 7 (emphasis added).

79. For Article 14, see *infra* notes 101-02 and accompanying text.

80. The other provisions are: 7(c), to comply with law; 7(d), to protect the information subject; and 7(e), in the public interest or carried out in exercise of public authority. Draft

processing when the data subject has given consent.⁸¹ Article 7(b) allows processing "necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract."⁸² Article 7(f) permits processing "necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject."⁸³

While the operative legal concepts of Article 7(a) (collection with consent) and Article 7(b) (in preparation or performance of a contract) are fairly definite, those of Article 7(f) are considerably more indefinite. The Draft Directive itself offers scant guidance in determining under Article 7(f) what interests are legitimate and when they might be "overridden by the interests . . . of the data subject."⁸⁴ The explanatory memorandum to the 1992 Commission Draft offered only a bit more guidance when it stated that "this balance-of-interest clause is likely to concern very different kinds of processing, such as direct-mail marketing and the use of data which are already a matter of public record."⁸⁵ Data protection authorities might seize on this comment as an authorization of general collection and distribution of public information.

Article 9. Journalism exemption. Article 9 provides that "Member States shall provide exemptions . . . for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression which prove necessary to reconcile the right to privacy with the rules governing freedom of expression." This direction to the Member States to create exemptions for journalism is the clearest example in the Draft Directive of an attempt to balance protection of privacy and freedom of information.⁸⁶ The Draft Directive itself, however, gives no clear direction as to what the nature and scope of these exemptions ought to be.

As an effort to balance competing interests of privacy protection and freedom of information, the Article is subject to criticism. On the one hand, it may be criticized as being too broad, since it gives Member States a broad authorization to exempt journalistic activity from the constraints of

Directive, *supra* note 1.

81. Id. art. 7(a).

82. Id. art. 7(b).

83. Id. art. 7(f).

84. Similarly, Article 6(1)(b) provides that data must be "collected for specified, explicit and legitimate purposes and used in a way compatible with those purposes." Id. art. 6(1)(b).

85. 1992 Commission Draft, *supra* note 1, at 4 (explanatory memorandum).

86. The preamble, 37th recital, expressly recognizes freedom of information: "Whereas the processing of personal data for purposes of journalism or for purposes of artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive insofar as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

data protection. On the other hand, it may be criticized as being too narrow, since it limits that authorization to activities conducted "solely for journalistic purposes." Indeed, both texts may suggest the opposite.

While the interest of free expression is particularly strong in the case of journalism, so too is the individual's interest in privacy. Because of the opportunities for broad dissemination, it is especially likely that in the case of journalism, individuals would be interested in, for example, a right to correction.

On the other hand, limiting exemptions to journalism leaves many activities that should fall under freedom of information protection uncovered. The usual definition of journalism is limited to print and broadcast media.⁸⁷ But freedom of expression is not a monopoly of journalism. The information highway that has led to the felt need for data protection laws has created new opportunities for communication which share aspects of traditional journalism or simply traditional free speech. For example, is there a basis for treating on-demand, on-line information providers differently than the publications some of them carry?⁸⁸

Data Content and Security

Article 6. Data quality. Article 6 of the Draft Directive mandates a number of requirements for data quality. Article 6(1)(c) provides that personal data collected must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or for which they are further processed."⁸⁹ Article 6(1)(d) provides that data must be "accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified."⁹⁰ A practical infirmity of the provision is that it fails to recognize adequately the inchoate nature of data collection. It assumes a focused purpose that collectors of information may not always have. Business and science professionals sometimes capture information before being certain of its accuracy or utility. Only after using such information may the user determine its accuracy or completeness.

Article 8. Sensitive data. Article 8(1) of the Draft Directive requires that Member States prohibit processing of certain special categories of data, such as racial or ethnic information and political or religious beliefs.⁹¹ Article 8(2) then requires Member States to permit that processing in five

87. The title of Article 9 is "Processing of personal data and freedom of expression." Directive, *supra* note 1, art. 9.

88. In Germany, there have been attempts to distinguish traditional journalism from advertising-oriented journalism, including supermarket newsletters. See Paefgen, *supra* note 60, at 17.

89. Draft Directive, *supra* note 1, art. 6(1)(c).

90. *Id.* art. 6(1)(d).

91. *Id.* art. 8(1).

specified instances.⁹² One of these instances, (e), provides that processing shall be permitted when "the processing relates to data which are manifestly made public by the data subject . . ." Were this exception a general exemption to the Draft Directive, and not just to sensitive data, the impact of the Draft Directive on collection and dissemination of business information involving individuals would be much reduced. Article 8(3) requires Member States to permit processing of data required for medical purposes and processed by medical personnel.⁹³ Finally, Article 8(4) permits Member States, on grounds of important public interest, to lay down additional exemptions.⁹⁴

Article 17. Security of processing. Article 17 mandates that Member States impose requirements on security of processing. While a common-law perspective suggests asking why these requirements are imposed in all cases, Article 17 implicitly recognizes third party interests in processing. The Article uses limiting words such as "appropriate" and "sufficient" to qualify its requirements, acknowledging that the full range of security protections used by a processor need not necessarily be used in every instance.

Data Subject Rights

Articles 12 and 13. Right of access. Article 12 of the Directive requires that Member States provide information subjects with wide-ranging rights to obtain information about personal data held by others. Those rights include having information corrected when incorrect.⁹⁵ Article 13 allows Member States to make exceptions to those rights of access (e.g., national security).⁹⁶ Requirements that data collectors open their files to individuals on whom they collect data draw the same objections as proposals to impose uniform data quality standards. A practical infirmity of this Article is that it anticipates developments in database design that are not yet fully implemented. Even companies that make it their business to license information to others may have difficulties in complying with such laws. Under these provisions, Member States may adopt laws that do not recognize the difficulties of searching files. For example, not all computer files are searchable for every bit of data found in them. Québec, which recently adopted its own data protection law, deals with this problem in part by restricting the applicability of the law generally to *files* on particular individuals. It does not extend the law to personal information held incidental to other files.⁹⁷ The EU may take the same approach as

92. Id. art. 8(2). The five instances are: (a) consent of data subject; (b) controllers' compliance with employment law; (c) protect data subject in specified situations; (d) by certain organizations regarding their members; and (e) data subject has made data public or processing is necessary to exercise legal claims.

93. Id. art. 8(3).

94. Draft Directive, *supra* note 1, art. 8(4).

95. Draft Directive, *supra* note 1, art. 12(2).

96. Id. art. 13.

97. See Raymond Doray, *The Act Respecting the Protection of Personal Information in*

Québec. According to the Commission and Council in a statement for entry in the minutes accompanying the Draft Directive, "[I]n line with the current definition in Article 2, the Draft Directive covers only filing systems, not files."⁹⁸

Articles 10 and 11. Information to be given to data subject. Articles 10(1) and 11(1) of the Draft Directive require that the controller of personal data inform the data subject of disclosure of the data to a third party except in cases where the data subject already knows.⁹⁹ Again, as with other provisions of the Draft Directive, the Article is fairly explicit about what Member States must include in their laws. Here, the Article lists particulars of what must be contained in the notification.

Whether notification is required before data is collected or when it is first distributed is of substantial significance for business. While demand for information is practically instantaneous, collection of information is not. While some information can be collected rapidly, some can be collected only over time. If, for example, a business has not been collecting records of suits and judgments generally, it will not be able to report with confidence that there are none when asked by someone who wants to do business with that party. Consent given at the moment of distribution is practically useless for the transaction immediately contemplated. New business start-ups may well be disadvantaged and slowed because of a lack of current information.

Article 11(2) provides that Article 11(1), which requires disclosure of the fact of processing to the data subject, shall not apply where "the provision of information proves impossible or involves a disproportionate effort, or if recording or disclosure is expressly laid down by law."¹⁰⁰ Article 11(2) gives as examples of such instances, statistical purposes, historical and scientific research, but does not limit its exception to these cases. How the Member States implement this exception is important from a business perspective. A business that routinely disseminates personal data might choose to locate its processing operations in a Member State that exempts its operations from that prior notification requirement rather than settle in a Member State where notification is demanded in every such case. Such a result, of course, runs counter to the Draft Directive's goal of achieving a Single European Market.

Articles 14. Right to object. Article 14 provides that Member States, at least in the cases of Article 7(e) and (f), shall grant data subjects the right

the Private Sector: The Countdown is on for all Companies! 3, Memorandum prepared and distributed by the Lavery, de Billy law firm (1993) (on file with the University of Iowa College of Law library) ("We have every reason to believe that the enterprise which neither keeps nor files its documents so that they may be traced in relation to the identify of a natural person and which is not asked to make a decision with regard to this person does not compile a file on others."). The statute, however, does not clearly require this interpretation.

98. Statements for Entry, *supra* note 77, at 4. *See* Maxeiner, *supra* note 1.

99. Draft Directive, *supra* note 1, arts. 10(1), 11(1).

100. *Id.* art. 11(2).

to object at any time "on compelling legitimate grounds" to the processing of data on them.¹⁰¹ It further provides that where there is a justified objection to the data, the processing shall no longer include that data. Moreover, Article 14(b) provides that the controller must ensure that the opportunity to object has been expressly offered to the data subject before the controller discloses personal data to third parties or uses that data for the purposes of direct marketing.

The right to object in Article 14 of the Draft Directive is less far-reaching than was its counterpart in Article 15 of the 1992 Commission Draft. For example, in the current version, Member States are required to provide a right to object only in the cases of Article 7(e) and (f); the 1992 Commission Draft had foreseen the right to object in the case of every provision of Article 7.¹⁰² Further, the Draft Directive now requires a "compelling" ground for the objection; before it did not. In the event that the objection is justified, the Draft Directive requires merely that "the processing instigated by the controller may no longer involve those data"; the 1992 Commission Draft had required that "the controller shall cease the processing." These limitations lessen the burdens imposed by the Draft Directive on business information providers.

Government Notification

Articles 18 and 19. Article 18 mandates that Member States include in their laws an obligation to notify a supervisory authority before carrying out any automatic processing or set of processing operations intended to serve a single or related purposes.¹⁰³ Article 19 provides in detail what facts must be stated in the notification. Article 18(2) provides for situations in which Member States may simplify or exempt categories of processing which "are unlikely . . . to affect adversely the rights and freedoms of data subjects."

CONCLUSION

The Council, in its Draft Directive, only begins the process of drafting data protection legislation consistent with the public's interest in a free flow of business information. It is certainly welcome that the Common Position more clearly acknowledges the importance of freedom of information that did the Commission's own proposals to the Council. It is also welcome that the Common Position eases some of the burdens imposed on information providers by the Draft Directive. Still, the Common Position, even if the European Parliament approves it without change, will leave much work for national legislatures in implementing the Draft Directive. Common law experiences suggest that in fashioning that new legislation, national legislatures should find compelling the public's

101. Id. art. 14(a).

102. See *supra* notes 78-85 and accompanying text for a discussion of Article 7.

103. Draft Directive, *supra* note 1, art. 18(1).

interest in a free flow of information. They ought not take a cramped view of the freedom of information that restricts its beneficiaries to the traditional media. They should take into account the nature of the information involved, its source, and its intended use, before imposing heavy burdens on those who collect and disseminate it.